Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1060

KAREN CONDIT AND MARY E. ORAVEC,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 27, 1978

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IN THE
SUPREME COURT OF THE UNITED STATES
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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT

Petitioners, Karen Condit and Mary E. Oravec, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on July 28, 1977, affirming the judgment of the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The per curiam opinion of the court of appeals, reported at 558 F.2d 1176 (4th Cir. 1977), is attached hereto as Appendix A, pp. 1a-3a, infra. The memorandum opinion and order of the United States District Court (by Senior Judge Oren R. Lewis), unofficially reported at 13 F.E.P. Cases 689 (E.D. Va. 1976), is attached hereto as Appendix B, pp. 4a-22a, infra.

JURISDICTION

The judgment of the court of appeals, attached hereto as Appendix C, pp. 23a-24a, infra, was entered on July 28, 1977. A timely petition for rehearing, filed on August 10, 1977, was denied by order dated August 31, 1977, attached hereto as Appendix D, pp. 25a-26a, infra. On November 10, 1977, petitioners filed an application for extension of time in which to file a petition for writ of certiorari, seeking an extension of the time for filing of a petition for writ of certiorari for 60 days, from November 29, 1977, to and including January 28, 1978. The application was granted on November 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an airline can justify its policy requiring every female flight attendant to take an unpaid maternity leave from the time that she learns of her pregnancy until a post-pregnancy medical examination satisfies the airline that she may return to

duty, as a bona fide occupational qualification ("bfoq") under Section 703(e) of Title VII of the Civil Rights Act of 1964, as amended, or as a business necessity, by showing only that the challenged policy is "consistent with," rather than essential to, a legitimate business objective of the airline.

2. Whether an employer can succeed on a bfoq or business necessity defense on the ground that safety requires the policy at issue when (a) the agency charged with regulating safety has determined that the policy is not necessary to ensure safety and (b) the employer itself has no empirical evidence or studies to justify the policy in terms of safety.

STATUTES AND REGULATIONS INVOLVED

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e-2(a) and (e)(1) (1970 and Supp V. 1975), and Section 1604.2(a)(1) of the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1976), appear in Appendix F, pp. 33a-55a, infra.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners Condit and Oravec were stewardesses employed by United Air Lines,

Inc. ("United"). Both petitioners, upon learning that they were pregnant and upon reporting that fact to United in 1972, were subjected to United's "forced leave" and "pregnancy exclusion" policies. The "forced leave" policy requires all female flight attendants who become pregnant to take unpaid leaves of absence commencing at the time that they learn of their pregnancies and ending only after a post-pregnancy medical examination satisfies the airline that they are physically able to return to duty. In accordance with that policy, petitioners were placed on unpaid leave without a determination, either by their own physicians or United's, that they were physically or emotionally unable to continue to perform their job responsibilities. The "pregnancy exclusion" policy prevents all pregnant flight attendants from using their accrued sick leave time and makes them ineligible to receive temporary disability benefits that are otherwise available to non-pregnant employees on leave.1/ The result of both aspects

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1/ Since the early 1930's, United has maintained a consistent policy that no stewardess may continue to perform her job responsibilities after the time that she learns that she is pregnant. As stipulated by United, its policy was based on an oral opinion offered in 1938 by Dr. George Kidera, an employee of United who has been United's chief medical officer since 1950, that "for medical reasons," United should not permit stewardesses to continue their duties after learning of their pregnancies. United stipulated further that it "relied upon

(Continued)

1/ [continued from preceding page] that opinion of Dr. Kidera without seeking other medical opinions until late 1972 or 1973, when United and other members of the ATA [Air Transport Association] began discussions and correspondence directed to obtaining additional medical evidence." By that time, both petitioners had filed charges with the EEOC.

Until 1968 it was also United's policy to fire a stewardess as soon as she reported her pregnancy. In 1969, during the pendency of a Title VII case challenging a further United policy which barred married stewardesses from continued employment, Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971), United entered into a collective bargaining agreement (retroactive to 1968) which established the current policy of unpaid leave (as an alternative to the previous policy of firing pregnant stewardesses) but retained the historic position that prohibited pregnant stewardesses from working. The policy provides:

> "A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed neces-

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of United's pregnancy policy, taken together, was that petitioners, like all United stewardesses who bear children, were required to cease working for a minimum of seven months, receiving neither pay nor fringe benefits during that long forced leave period.

Petitioner Condit instituted this litigation on May 7, 1974, claiming that United's forced leave and pregnancy exclusion policies discriminated against her on the basis of sex in violation of Sections 703(a)(1) and (2) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2(a) (1970). Petitioner Oravec intervened on July 31, 1974, raising identical claims.2/

1/ [continued from preceding page] sary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence, however, she shall not accrue vacation or sick leave during the period of the leave and shall not be eligible for sick leave benefits for the time lost for pregnancy."

2/ On January 22, 1975, the petitioners' motion for certification of a class comprising "all female flight attendants or stewardesses now employed by [United] or so employed at any time beginning March 19, 1972" was granted by the district court.

Count I of petitioners' complaint challenged the forced leave aspect of United's pregnancy policy and sought an injunction, back pay, and other appropriate equitable relief; Count II challenged the pregnancy exclusion aspect of that policy and sought similar relief. The district court determined to stay Count II of the complaint until after a decision was rendered in Gilbert v. General Electric Co., 429 U.S. 125 (1976), then pending in the Fourth Circuit. Count I proceeded to trial, the court having denied petitioners' motion for summary judgment on June 3, 1975. On September 3, 1976, the district court issued a Memorandum Opinion and Order denying the relief sought and dismissing the forced leave claim. Petitioners noticed an appeal from the district court's order denying an injunction on Count I. Count II remains stayed in the district court. Consequently, the question presented in this petition arises only in connection with the forced leave claim.

B. The District Court Decision

The issues presented to the district court were, first, whether United's forced leave policy constituted discrimination on the basis of sex within the meaning of Section 703(a)(1); second, whether the policy "limited, segregated or classified" employees so as "to deprive [United's female employees] of employment opportunities" within the meaning of Section 703(a)(2); and third, if the policy did constitute sex discrimination or deprived female

employees of employment opportunities, whether such policy could nevertheless be justified as a bona fide occupational qualification ("bfoq") under Section 703(e) or as a "business necessity."

The court did not discuss or decide whether United's forced leave policy deprived petitioners of employment opportunities under Section 703(a)(2). The court did, however, state that it had "grave doubts" as to whether the policy constituted sex discrimination. It concluded that the question need not be answered because the policy was justified as a bfoq.

In reaching its decision, the court did not find that petitioners were either emotionally or physically unfit to perform their duties. On the contrary, the court found that "United did not cause any medical examination to be made of Mrs. Condit or Mrs. Oravec for the purpose of determining whether their condition rendered either or both of them incapable of performing their duties as stewardesses." App. B at 7a, infra.

Similarly, the court did not find that United had any empirical evidence that pregnant stewardesses were incapable of performing their duties at any time during their pregnancies. The court found that during the years 1972-1974, of the approximately 1,000 stewardesses who reported their pregnancies to United, approximately 570 stewardesses failed to report their pregnancies until after the eighth week. App. B at 8a, infra.

The court further found that Northwest Airlines had adopted a policy of permitting pregnant stewardesses to continue working as long as they wished, provided they brought in a weekly letter from their doctors after the sixth month approving their continued employment. App. B at 10a, infra. The court, noting that the medical evidence presented on the question of a pregnant stewardess's ability to continue to perform her duties effectively was in conflict, concluded that "[t]he only clear area of agreement amongst the doctors that testified in this case is that there are virtually no studies or empirical data directly relating to the issues here * * * ." App. B at 12a, infra.

The court then looked to the Federal Aviation Administration ("FAA"), the agency charged with promoting flight safety. Section 601(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1421(b), provides that the FAA Administrator is to determine safety regulations in light of the airlines' duty to perform their services with the "highest possible degree of safety in the public interest." The court found that, with respect to the issue of pregnant stewardesses, the FAA had not only determined not to promulgate a regulation restricting the employment of all pregnant stewardesses, but rather had taken the position that the matter should be resolved on an individual basis.

> "The FAA has not set forth limits for crew members because of pregnancy. Basically, we feel that a

> pregnant woman with no complications is in good health. Consideration of whether a flight attendant should fly when pregnant is a matter between herself, her doctor and her employer. It must be remembered, however, that flight attendants, when serving as required crew members, should be able to perform all assigned tasks." App. B at 9a, infra.

The court, however, did not defer to the FAA's judgment. The court ruled that "[p]regnant stewardesses are more susceptible to cramp, fatigue, back strain, nausea and vomiting than non-pregnant stewardesses." App. B at 16a, infra. The court found further that "[a]lthough these symptoms do not occur in every individual pregnancy -- and flying neither causes nor aggravates any of them -- it is impossible to predict when and if any individual may develop one or more of them." App. B at 16a-17a, infra. The court, noting that the FAA requires pilots to cease commercial flying at age sixty as a safety precaution, compared the question of a pregnant stewardess's ability to continue working to that of an aging pilot's. "It is just as probable," the court reasoned, "that a pregnant stewardess may be confronted with a sudden incapacity associated with her pregnancy as a sixty-year-old pilot with an unexpected heart attack -- Either or both would jeopardize the safety of the passengers during an emergency." App. B at 19a, infra. The court concluded that "[t]aking into account the total pregnancy picture as here shown" United was justified

in enforcing its forced leave policy as a bfoq. App. B at 21a, infra.

C. The Court of Appeals Decision

The Fourth Circuit, in a brief per curiam opinion, affirmed the holding of the district court. The court stated that the district court had found, on conflicting expert testimony, "that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft." App. A at 2a, infra. (Emphasis added.) The court stated further that the district court had therefore concluded that United's forced leave policy "was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers." App. A at 3a, infra. Having concluded that the findings of fact made by the district court were not clearly erroneous, the court affirmed, without further discussion, the district court's legal conclusion that United's policy was justified as a bfoq.

REASONS FOR GRANTING THE WRIT

The court of appeals held that United's forced leave policy constituted a bfoq because the policy was "consistent" with its obligation to maintain the highest degree of safety in the public interest.3/ The standard thus articulated by

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3/ In order to reach the bfoq question, the Fourth Circuit had to assume that United's policy violated either Section 703

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the court for establishing a bfoq defense, requiring only that an employer prove that its policy was consistent with a legitimate business objective, rather than necessitated by it, is contrary to standards followed by other courts of appeals, and is in conflict with this Court's decisions in Dothard v. Rawlinson, ___ U.S. ___, 45 U.S.L.W. 4888 (June 27, 1977), and Nashville Gas Co. v. Satty, ___ U.S. ___, 46 U.S.L.W. 4026 (December 6, 1977). As will be discussed below, adoption of such a standard would permit the bfoq exception to swallow the rule, allowing employers to discriminate against female employees, or limit their employment opportunities,

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3/ [continued from preceding page] (a)(1) or Section 703(a)(2) of Title VII. The district court did not rule on the issue, stating only that it had "grave doubts" as to whether the policy constituted sex discrimination. Accordingly, there is no holding on this issue for this Court to review. Petitioners believe, however, that, while the question whether a forced leave policy similar to United's violates Section 703(a) has never squarely been decided by this Court, the resolution of this issue is governed by this Court's recent decision in Nashville Gas Co. v. Satty, ___ U.S. ___, 46 U.S.L.W. 4026 (December 6, 1977); see also Jacobs v. The Martin Sweets Co., Inc., 550 F.2d 364 (6th Cir.), cert. denied, 45 U.S.L.W. 3753 (1977); c.f., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

whenever the employer can construct a rational explanation for the challenged policy.4/

Courts of appeals have adopted the "virtually uniform view * * * that § 703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." Dothard, supra, at 4891. The scope of the exception has been expressed in various forms. In Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir. 1971), which struck down Pan American's rule prohibiting men from being employed as flight attendants, the court held that a policy that discriminated on the basis of sex would be valid "only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) An earlier Fifth Circuit formulation of the bfoq exception, in Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228, 235 (1969), provides that an employer can establish a bfoq only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to per-

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4/ The court of appeals here addressed only the issue of the bfoq defense, and not the question whether the policy could be justified by business necessity. Although it is not clear which defense is appropriate, compare Dothard, supra, with Satty, supra, petitioners have contended throughout this litigation that United could not meet the standards of either defense.

form safely and efficiently the duties of the job involved." See also Houghton v. McDonnell Douglas Corp., 553 F.2d 561, cert. denied, 46 U.S.L.W. 3357 (1977), where the Eighth Circuit, relying on Weeks, held, under the Age Discrimination Act, that evidence based on studies reflecting the psychological and physiological effects of aging on the general population did not establish a bfoq to justify the employer's removing a test pilot from flight status on the basis of his age.5/

In Dothard this Court affirmed the courts of appeals' interpretation of the bfoq exception. "[W]hatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." 45 U.S.L.W. at 4891. Thus this Court concluded:

> "We are persuaded -- by the restrictive language of § 703e, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission -- that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Id.

The scope of the bfoq exception has been addressed by this Court only once, in the Dothard case, where the policy at issue explicitly prohibited females from obtaining employment , and where the Court recognized the employment at issue -- a prison guard in an Alabama maximum security male prison -- as virtually unique in its hazards. More recently, however, in Nashville Gas Co. v. Satty, supra, without specifically discussing the bfoq exception, this Court articulated the standard that employers are required to satisfy in order to justify an employment policy that has the effect of limiting the employment opportunities of female employees or adversely affecting their job status. At issue in Satty was an employment policy that divested female employees of accumulated seniority when they returned to work after a pregnancy leave.6/ This Court found that the policy "imposed on women a substantial burden that men need not suffer," and concluded

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5/ In Sprogis v. United Air Lines, supra, 444 F.2d at 1199, the Seventh Circuit stated that "Section 703(e)(1) calls for employers to treat their employees as individuals. United's blanket prophylactic rule prohibiting marriage unjustifiably punishes a large class of prospective, otherwise qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts."

6/ A second policy at issue in Satty was that female employees on a pregnancy leave were denied sick pay while on leave. This Court held that, under Gilbert, the policy was not unlawful. The Court's analysis of this issue is not relevant to petitioners' claims. United's sick leave policy is not

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that "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different roles" was in violation of Section 703(a)(2). Satty, supra, at 4026. Having found the existence of a "facially neutral seniority system [that] deprive[d] women of employment opportunities because of their sex," this Court then looked to see if the employer's business "necessitates the adoption of particular leave policies." Id. at 4028. (Emphasis added.) Business necessity is thus the standard that employers must meet in order to justify a policy that limits employment opportunities of women or adversely affects their job status. See also Griggs v. Duke Power Co., 401 U.S. 424 (1971).

6/ [continued from preceding page] at issue in this petition, except to the extent that in this case, for the first time, this Court has before it a two-pronged maternity policy that says, on the one hand, all pregnant women are physically and emotionally disabled from performing their duties and, on the other hand, all pregnant women are neither sick nor disabled for purposes of entitlement to sick leave or disability benefits. Neither in Gilbert nor in Satty did the employer make the determination as to the fact or length of disability from working. That "forced" leave element was present in but not decided in Richmond Unified School District v. Berg, 46 U.S.L.W. 4032 (Dec. 6, 1977) and was also present -- though not in the context of Title VII -- in LaFleur, supra.

The Fourth Circuit standard for establishing a defense to an otherwise unlawful policy cannot withstand either Dothard or Satty analysis. Dothard states that the bfoq exception was intended to be an "extremely narrow exception" to justify otherwise unlawful employment practices. The Fourth Circuit standard, permitting an employer to justify an otherwise discriminatory policy by presenting any reason that is "consistent" with legitimate business objectives, transforms the narrow bfoq exception into a large loophole available to employers seeking to justify discriminatory policies. Satty indicates that an employer can only justify an otherwise unlawful pregnancy policy by demonstrating "business necessity." Consistency is a far cry from necessity. United, for example, could, "consistent" with its safety obligations, choose not to hire female flight attendants at all, on the ground that, for purposes of emergency evacuations, men as a class are physically stronger and therefore better able to push open blocked exits and remove passengers from the aircraft. United has unsuccessfully argued, however, that business necessity required hiring only women and not men. See Sprogis, supra. In any event, both Sprogis and Diaz v. Pan American World Airways, supra, hold that sex-stereotyped hiring policies for flight attendants are invalid.

In short, the impact of Dothard and Satty is that employers cannot maintain policies that discriminate on the basis of sex or limit the employment opportunities of female employees, unless they can show that such a policy is essential to a legit-

imate business objective. The policy cannot rely on stereotypes, but must be grounded on a factual showing that all or substantially all women cannot effectively perform the job in question. The record in the instant case and the findings of the district court do not meet such a standard. The findings of the court reveal that United had no factual basis for believing that all or substantially all pregnant stewardesses were unfit to work during the entire period of their pregnancies. No studies were prepared, no data collected on stewardesses who continued to work either for United or for any other airline during the early months of pregnancy, and no attempt was made to make an individual determination as to whether petitioners were able to continue to perform their duties.7/ Further, the FAA, the agency charged with promoting flight safety, has determined that an inflexible forced leave policy like United's is not required in order for United to satisfy its flight safety obligations. Thus, the application

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7/ The district court's finding that there are "virtually no studies or empirical data * * * both with respect to published studies in medical and scientific literature and with respect to internal studies by United or other air carriers," (App. B at 12a, infra) was based on the testimony of United's own witnesses. The testimony, attached as Appendix E, shows that although United had ample opportunity to test the validity of its theory that the continued employment of pregnant stewardesses might jeopardize flight safety, it never made any effort to do so.

of a lower bfoq standard by the Fourth Circuit was critical to the result reached in the litigation.

The importance of the question presented here is magnified by the fact that there are at least five other lawsuits now pending in the federal courts, both in the Fourth Circuit and elsewhere, challenging forced leave pregnancy policies virtually identical to the policy at issue here. Two of those suits, including one now pending in the Fourth Circuit, have reached results inconsistent with the holding in this case.

MacLennan v. American Airlines, Inc., 15 F.E.P. Cases 1684 (E.D. Va. 1977), reached a decision flatly in conflict with the decision reached by the district court here. In MacLennan the same district court (by Judge Bryan) struck down a forced leave policy identical to United's, holding that "insofar as the regulation requires automatic termination of women prior to the 26th week of gestation * * * it is invalid and must be enjoined." Id. at 1689. The court, rejecting American's argument that the forced leave rule could be justified as a bfoq, took exception to the reasoning in the instant case and explained:

> "As in Condit, this Court is aware of the high duty of care a carrier owes its passengers, but the incantation of a safety rationale is not an abracadabra, to which this Court must defer judgment. The defendant must prove that the policy is reasonably necessary, not merely that it is 'reasonable,' as the defendant apparently contends." Id. (Emphasis in original.)

In reaching its conclusion, the district court relied heavily on the position of the FAA. The court noted that while FAA regulations "deal extensively" with qualifications for flight crew members, these regulations "stand[] in sharp contrast to the minimal FAA qualifications for the position of flight attendant." Id. at 1688. In addition, the court pointed out that on at least two occasions the FAA has expressed its view that the question of whether a pregnant flight attendant should fly is a matter between herself, her doctor, and her employer.

In re National Airlines, Inc. (Maternity Leave Practices and Flight Attendant Weight Program Litigation), 14 F.E.P. Cases 1806 (S.D. Fla. 1977), a case noted but not discussed by the Fourth Circuit in the instant case, also reached a conclusion in conflict with the decision of the district court here. In the National Airlines case, the court held that the airline's forced leave rule could be justified as a bfoq only after the twentieth week of pregnancy.8/

8/ The most striking conflict, however, is found in Rosenfeld v. United Air Lines, No. CS-32898-74 (N.Y.Div. of Human Rights, September 19, 1975), challenging United's forced leave policy under the New York Human Rights law. In Rosenfeld, the Commissioner, after hearings before a hearing examiner, held United's forced leave policy unlawful on the ground that the policy discriminated on the basis of

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The only case thus far decided at the trial court level that has reached a conclusion consistent with the holding in the instant case is Harriss v. Pan American World Airways, Inc., 437 F.Supp. 413 (N.D. Calif. 1977). Harriss is now pending before the Ninth Circuit.9/

Thus, the uncertainty as to the application of the bfoq exception to airline forced leave pregnancy policies has created considerable confusion in the lower courts. Unless the question presented here is resolved by this Court, female flight attendants, who are similarly situated except for the company for which they work or state in which they live, will suffer from an irrational inconsistency in airline pregnancy policies. Further, unless this Court addresses the standard to be met by employers raising safety as a bfoq

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8/ [continued from preceding page]
sex and could not be justified by business necessity. The Human Rights Appeals Board affirmed that decision on appeal (App. No. 3065, 4/22/77). The case is now pending on appeal sub nom. United Air Lines v. State Human Rights Appeal Board et al., N.Y. Sup. Ct., App. Div., 2d Dept.

9/ The two remaining cases, Burwell v. Eastern Airlines, Inc., C.A. No. 74-0418-R (E.D. Va.), and ALPA and Association of Flight Attendants v. Western Airlines, Inc. (N.D. Calif.), have both been tried, but have not yet been decided. Petitioners believe that there are further cases as well pending against other airlines.

or business necessity defense, female employees may be subject to discriminatory policies in every area of employment where safety could conceivably be at issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted and the judgment of the court be reviewed on the merits.

Respectfully submitted,

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January 27, 1978

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 76-2296

Karen Condit and
Mary E. Oravec, Appellants,

-v-

United Air Lines, Inc., Appellee.

Appeal from the United States
District Court for the Eastern District
of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Argued April 7, 1977

Decided July 28, 1977

Before WINTER, BUTZNER and
HALL, Circuit Judges.

Martin J. Flynn (Wendy S. White, Shea & Gardner on brief) for Appellants; Kenneth A. Knutson (Joseph A. Rafferty, Jr., and Earl G. Dolan on brief) for Appellee; (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Lutz Alexander Prager and Marilyn S. G. Urwitz, Attorneys, Equal Employment Opportunity Commission on brief as Amicus Curiae).

PER CURIAM:

Karen Condit, a stewardess representing a class composed of herself and all others similarly situated, and Mary E. Oravec, an intervenor, appeal from an order of the district court holding that the maternity leave policy of United Air Lines, Inc., constitutes a bona fide occupational qualification under § 703 (e) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 1 2000e-2(e)). We affirm.

United requires that all stewardesses discontinue flying as soon as they become aware that they are pregnant. The stewardesses contend that each stewardess should be allowed to continue working as long as she can safely perform her duties.

The district court found, on conflicting expert testimony, that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It therefore concluded

that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers.*

The district court's ruling that United's policy is a bona fide occupational qualification is based on findings of fact which, on the evidence presented by this record, are not clearly erroneous. Fed. R. Civ. P. 52 (a). Accordingly, the judgment is affirmed.

---

* In the only other reported case on the subject that has been brought to our attention, the court held that a pregnant stewardess can be automatically barred from flying under the bona fide occupational qualification rationale only after the twentieth week. In Re: National Airlines, Inc. Maternity Leave Practices and Flight Attendant Weight Program Litigation, No. 75-719-Civ-NCR (S. D. Fla. May 17, 1977).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KAREN CONDIT and MARY E. ORAVEC,	:	
Plaintiffs	:	
	:	Civil Action
v.	:	No. 74-250-A
UNITED AIR LINES, INC.,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

Karen Condit brought this class action, on behalf of herself and those similarly situated, against her employer, United Air Lines, Inc., under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3), claiming that United's policy regarding maternity leave and disability coverage for pregnant stewardesses is unlawful under 42 U.S.C. § 2000e-2(a).

Mary Oravec was permitted to intervene as a party plaintiff.

The policy has been incorporated in and made a part of ALPA collective bargaining agreement with United since October of 1969. It reads as follows:

"A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence; however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy.

* * * *

"Sick leave pay shall be granted only in cases of actual sickness or injury. A stewardess may make up non-occupational sick leave in accordance with Section 6, Paragraph H."

United claims that its policy of requiring stewardesses to discontinue flying upon knowledge of pregnancy is not discrimination based on sex -- and, if so, its maternity leave policy is justified as a bona fide occupational

qualification pursuant to 42 U.S.C. § 2000e-2(e).

Count One of the complaint challenges United's maternity leave policy requiring stewardesses to discontinue flying upon knowledge of pregnancy.

Count Two challenges United's exclusion of pregnancy from its sick leave and disability coverage.

This Court has stayed its ruling on the plaintiffs' motion for summary judgment as to Count Two pending the decision of the Supreme Court of the United States in Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975) (on appeal from the Richmond Division of this court). That appeal is still pending before the Supreme Court and probably will not be reached before early 1977 -- Therefore this Court's ruling on the plaintiffs' motion for summary judgment as to Count Two will be further delayed until the Supreme Court renders its decision in Gilbert v. General Electric Company.

Although this Court has delayed its rulings on the issues raised in Count One of this complaint in the hope that the Supreme Court decision in the Gilbert case might shed some light on the path that should be followed in the premises, further delay cannot be justified.

Count One was heard by the Court on stipulations, exhibits and live testimony.

The record thus made discloses that Karen Condit reported to her supervisor on July 5, 1972 that she was pregnant. She was refused permission to make her scheduled flight on that date and advised that she would be placed on mandatory maternity leave effective July 5, 1972. Her child was born on November 15, 1972 and approximately ninety days thereafter she applied for and was granted a ninety-day extension of her maternity leave -- She resigned when that extension was about to expire.

Mary Oravec reported to her supervisor on October 10, 1972 that she was pregnant -- She was refused permission to make her scheduled flight on that date and was advised that she would be placed on mandatory maternity leave effective October 10, 1972. Her child was born March 16, 1973 -- Approximately ninety days thereafter she applied for and was granted a ninety-day extension of her maternity leave. She returned to active duty as a stewardess on September 1, 1973.

United did not cause any medical examination to be made of Mrs. Condit or Mrs. Oravec for the purpose of determining whether their condition rendered either or both of them incapable of performing their duties as stewardesses.

During the years 1972, 1973 and 1974 approximately one thousand of United's stewardesses reported their pregnancy -- All were placed on maternity leave.

Although United does not know at what stage its stewardesses reported their pregnancy, a sampling of some 362 of its stewardesses placed on maternity leave discloses that 43% reported their pregnancy at the end of the eighth week and 57% reported their pregnancy after the eighth week.

Captain Smith of United testified that most of their pregnant stewardesses were placed on leave by the end of the fourth month of pregnancy.

The plaintiff Oravec was in her 17th week when she reported her pregnancy -- The plaintiff Condit was in her 20th week.

Section 601(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1421 (b), provides that airlines have the duty to perform their services with the highest possible degree of safety in the public interest.

All carriers engaged in air transportation are subject to regulation by the Federal Aviation Administration and its Administrator on matters including safety, and the Administrator has been directed by Congress to promote safety

of flight in air commerce by prescribing regulations and standards concerning both equipment and personnel.

United usually assigns more flight attendants on its flights than the number required by the Federal Aviation Administration.

The position of FAA regarding policies of air carriers that require all stewardesses to discontinue flying upon knowledge of pregnancy is --

> The FAA has not set forth limits for crew members because of pregnancy. Basically, we feel that a pregnant woman with no complications is in good health. Consideration of whether a flight attendant should fly when pregnant is a matter between herself, her doctor and her employer. It must be remembered, however, that flight attendants, when serving as required crew members, should be able to perform all assigned tasks.

For an aircraft to be certified by the FAA it must, among other things, be demonstrated that the aircraft can be fully evacuated in ninety seconds using only 50% of the exits of the said aircraft.

Evacuation of passengers from the aircraft during emergencies is the sole function and responsibility of the flight attendants.

Planned evacuation procedures have been averaging about once a week on United's aircraft and unplanned evacuations have been occurring a little more than every two months.

The question of maternity leave and pregnancy disability policies in the airline industry has been considered by task forces established by the major industry organizations, the Air Conference and ATA -- Numerous meetings have been held.

The committee generally agreed that pregnant stewardesses should be placed on leave as soon as they reported their pregnancy.

All major airlines, except Northwestern, follow that recommendation.

Northwestern's policy is to have the flight attendant fly while pregnant as long as she wishes providing she brings in a weekly letter from her physician after the sixth month approving her continued employment.

The medical evidence tendered was in conflict on the question of whether or not pregnant stewardesses should fly -- All agree that common occurrences in early pregnancy are fatigue, fainting, morning sickness, nausea and back strain. In addition, 15 to 18 per cent of pregnancies result in spontaneous abortion during the first trimester. Although these symptoms do

not occur in every individual pregnancy, it is impossible to predict in advance when and if any individual may develop one or more of the said symptoms -- Flying neither causes nor aggravates any of these symptoms.

Dr. Kidera, United's specialist in aviation medicine since 1938, testified pregnant stewardesses should not fly.

Dr. Wolff was of a like opinion due to hormonal and emotional changes during pregnancy.

Dr. Winter testified that United's maternity leave policy was medically sound and would be recommended by him.

Dr. Hellegers testified that virtually all stewardesses who are otherwise healthy could perform their duties as well as a non-pregnant stewardess through the 20th week of pregnancy, virtually all could not perform safely and efficiently after the 28th week of pregnancy, and the capacity to perform safely and efficiently during the 21st through the 28th week would depend entirely upon factors that vary from individual to individual so that the decision as to capacity would have to be individualized during that period -- The question of capacity depends upon weight, gain and abdominal distention or girth as those factors reduce balance and mobility.

Dr. Hellegers further testified that if forced to choose an arbitrary date, he would place the cut-off date at 24 weeks since more than 50% of pregnant stewardesses would be capable of performing their duties at that stage.

Dr. Carter of the Mayo Clinic, Ob-Gyn Department, agreed that pregnant stewardesses can perform as well as non-pregnant stewardesses until such time in pregnancy as abdominal distention substantially reduces mobility.

The only clear area of agreement amongst the doctors that testified in this case is that there are virtually no studies or empirical data directly relating to the issues here except for oxygenation and peripheral studies on the physical capacity of pregnant women in sports competition. This is true both with respect to published studies in medical and scientific literature and with respect to internal studies by United or other air carriers.

The initial question for determination is whether United's policy of requiring its stewardesses to discontinue flying upon knowledge of pregnancy constitutes a prima facie violation of Title VII, as amended.

United's mandatory leave policy applies only to pregnant stewardesses. Clearly this is not a discrimination based solely on sex -- United's maternity leave policy -- if it be discrim-

ination -- is based on an exclusive female condition -- pregnancy.

Title 42 U.S.C. § 2000e-2 provides in part --

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The legislative history of Title VII prohibitions against discrimination on account of sex is extremely sparse -- some nine pages in the Congressional Record. What Congress in effect said was that the Title VII sex discrimination provisions did not reach those situations where men and women were not similarly situated.

Fourteen members of the House Committee on the Judiciary, in considering the equal rights amendment, stated that the original resolution does not require that women must be treated in all respects the same as men -- Quality does not mean sameness. As a result the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex -- For example, a law providing for payment of medical costs of child bearing could only apply to women.

Proponents of ERA have continuously contended that laws concerning child bearing and other matters relating to physical characteristics unique to one sex are not laws which discriminate upon the basis of sex.

The plaintiffs argue that the Supreme Court of the United States has broadened the prohibited Title VII discrimination to include sex plus another factor, that is, women with young children, citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970), and Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971). The factor in this case, pregnancy, is applicable to women only.

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), relied on by the plaintiffs does not deal with the question here, that is, whether a mandatory leave policy occasioned by pregnancy

constitutes a prima facie violation of Title VII, as amended.

The defendant relies in the main on Geduldig v. Aiello, 417 U.S. 484 (1974), which they read to say there is no sex discrimination when the policy [as here] relates solely to pregnant women and no other persons.

None of the cases cited by the parties or the legislative history is dispositive of the question here raised.

Although the undersigned has grave doubts that United's mandatory leave policy constitutes a Title VII employment discrimination on account of sex, that question need not be answered because on the record here made United's mandatory leave policy is justified as a bona fide occupational qualification pursuant to 42 U.S.C. § 2000e-2(e), which reads:

> "Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

United is a common carrier charged with exercising the highest degree of care for the safety of its passengers -- Said another way, the FAA statute, 49 U.S.C. § 1421(b), requires airlines to perform their services with the highest possible degree of safety in the public interest.

In short, the law imposes on United the obligation of taking no chances when it comes to safety.

Flight attendants are responsible for the comfort and safety of the passengers in both calm and turbulent air -- They are the sole company employees that evacuate passengers during emergencies -- They must demonstrate that an aircraft can be fully evacuated in ninety seconds using only half of its exits -- They work in close and cramped quarters.

United's planned evacuation procedures have been averaging about once a week -- Unplanned evacuations have been occurring a little more often than every two months.

Pregnant stewardesses are more susceptible to cramp, fatigue, back strain, nausea and vomiting than non-pregnant stewardesses -- There is also the danger of spontaneous abortion and hormonal changes in pregnant women, particularly in the early stages.

Although these symptoms do not occur in every individual pregnancy --

and flying neither causes nor aggravates any of them -- it is impossible to predict when and if any individual may develop one or more of them.

A committee composed of medical directors of all of the major airlines has generally agreed that pregnant stewardesses should report their pregnancy as soon as aware, stop flying and go on maternity leave. Though it was further agreed that perhaps this view could not be supported solely from medical statistics, they all agreed that the problem could not be divorced from operational aspects.

All of the major airlines follow this recommendation, except one -- By contract Northwestern permits pregnant stewardesses to fly up to six months or until she can no longer wear her uniform.

United's employment contract with the union representing its flight attendants provides that stewardesses must upon knowledge of pregnancy discontinue flying and . . . that she shall not be eligible for sick leave benefits for time lost for pregnancy.

Two of the non-airline medical experts that testified were of the opinion that pregnant stewardesses should not fly -- One said virtually all otherwise healthy, pregnant stewardesses could perform their duties as well as non-pregnant stewardesses through the 20th week -- none after the 28th week -- during the 21st through the

28th week dependent upon weight gain and abdominal distention or girth -- Another agreed that pregnant stewardesses could perform as well as non-pregnant stewardesses until such time as abdominal distention substantially reduced mobility.

United justifies its long-standing mandatory maternity leave policy upon its common law and statutory duty of exercising the highest possible degree of care for the safety of its passengers.

Though unpredictable as to time and place, they have shown that one or more of the foregoing pregnancy problems could suddenly manifest itself, and if this happened during an emergency United would have been derelict in its duty to the flying public were it to permit pregnant stewardesses to continue working while flying.

The FAA requires pilots to cease commercial flying at age sixty as a safety precaution.

The Second Circuit in Alpa v. Quesada, 276 F.2d 892 (1960), held --

> ". . . [A]vailable medical studies show that sudden incapacitation due to heart attacks or strokes become more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. . . ."

Although required by Congress to promote safety of flight in air commerce -- concerning both equipment and personnel (see 49 U.S.C. §§ 1421-30) -- the FAA has not set forth limits for crew members because of pregnancy.

Whether pregnant stewardesses should fly is left up to the stewardess, her doctor and the airline -- FAA cautions, however, that flight attendants should be able to perform all of their assigned duties.

It is just as probable that a pregnant stewardess may be confronted with a sudden incapacity associated with her pregnancy as a sixty-year-old pilot with an unexpected heart attack -- Either or both would jeopardize the safety of the passengers during an emergency.

The plaintiffs' argument that pregnant stewardesses should not be grounded during the first five or six months of pregnancy -- absent individualized medical support -- is best answered by the reasoning of the Seventh Circuit in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (1974). There the court stated --

> "As reflected in the Spurlock [Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972)] decision, a public transportation carrier, such as Greyhound, entrusted with the lives and well-

being of passengers, must continually strive to employ the most highly qualified persons available for the position of intercity bus driver for the paramount goal of a bus carrier is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."

Chief Justice Burger, in a Title VII racial discrimination case, said:

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424 (1971).

United has clearly shown by the record here made that its mandatory maternity leave policy has a manifest relationship to the continuing employment of stewardesses during their pregnancy.

The safety of the passengers must come first -- In case of doubt, that doubt must be resolved in favor of the passengers -- Airlines must take no chances when it comes to safety.

Taking into account the total pregnancy picture as here shown, United is justified in enforcing its mandatory maternity leave policy as a bona fide occupational qualification for the continued employment of stewardesses during their pregnancy.

The real issue here does not appear to be United's mandatory maternity leave policy -- It appears to be its refusal to recognize pregnancy as a compensable sickness or disability. That question is the heart of Count Two of this complaint and it no doubt will be definitively answered when the Supreme Court renders its decision in the Gilbert case.

For the reasons stated, Count One should be dismissed, and

It Is So Ordered.

This Court's ruling on the plaintiffs' motion for summary judgment as to Count Two will be further delayed pending the Supreme Court ruling in the premises.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/

United States Senior Judge

September 3, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 76-2296

Karen Condit and
Mary E. Oravec, Appellants,

-v-

United Air Lines, Inc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court

that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/

Clerk

Filed July 28, 1977

APPENDIX D

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 76-2296

Karen Condit and
Mary E. Oravec, Appellants,

-v-

United Air Lines, Inc.,

Appellee.

Equal Employment Opportunity
Commission, Amicus Curiae.

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner, and Judge Hall.

For the Court,

/s/
Clerk

Filed August 31, 1977

APPENDIX E

The following passages concern United's failure to perform any studies or collect data on the impact of pregnancy upon stewardess work performance. The passages include excerpts from the testimony of United's three witnesses at the trial: Captain J. D. Smith, Vice President, Flight Safety and Industry Affairs at United, Dr. George Kidera, Vice President, Medical Services, at United, and Dr. John R. Wolff, United's expert witness.

THE COURT: [H]ave you made any tests of pregnant women on United, attendants, participating in an emergency evacuation?

MR. FLYNN: Thank you, Your Honor.

THE WITNESS: [Captain Smith]: I have not sir.

THE COURT: Well, has United made any that you know of?

THE WITNESS: Not to my knowledge.

* * *

THE COURT: You said you made no tests; as far as you know, United has made none indicating the capabilities of pregnant stewardesses in all of their duties as compared to stewardesses who are not pregnant.

Now, I understand that you said that United had made no specific findings either way; is that right?

THE WITNESS [Captain Smith]: That's correct.

* * *

THE COURT: [I]f you know, did United have any pregnant stewardesses on the plane involved in the midway crash?

THE WITNESS [Dr. Kidera]: That has not been determined, sir.

THE COURT: Well, as far as you know medically speaking, has United learned after the crash, put it that way, or on any other occasions that United was involved in, had they learned after the crash if any of the working stewardesses were then pregnant?

THE WITNESS: No sir, because even if the individual had functioned --

THE COURT: (Interposing) My question, did you make a check after the crash?

THE WITNESS: No.

THE COURT: To find out whether or not the participating stewardesses, any of them, were or were not pregnant?

THE WITNESS: No, sir.

* * *

Q. [BY MR. FLYNN]: On the spontaneous abortion point, have you made any attempt to determine whether any of the stewardesses that are flown while pregnant on United have had spontaneous abortions?

A. [DR. KIDERA]: No.

* * *

Q. [BY MR. FLYNN]: Well, so you knew you had pregnant stewardesses that were flying. And did you ever make any attempt to determine if any of these same individuals had done their job well or not?

A. [DR. KIDERA]: No, sir.

* * *

Q. [BY MR. FLYNN]: I don't seem to be getting through on the point. The fact that you didn't find out until after they had flown, you didn't go back and find out how they had done their job before. You have not done that with respect to any of the pregnant stewardesses?

A. [DR. KIDERA]: No, there were no retrospective studies. ***

* * *

Q. [BY MR. FLYNN]: You knew then about Northwest Airlines, did you not?

A. [DR. KIDERA]: Yes.

Q. About its policy?

A. Yes.

Q. Do you know of any problems that Northwest had with that policy?

A. I never asked about them. I know about the report.

Q. You know of no reports of pregnant stewardesses who could not do their work on any kind of flight because of fatigue or nausea, do you? Do you have any report on that?

A. No.

Q. [BY MR. FLYNN]: Is there any study that indicates that performing stewardess type duties or just flying in any capacity has any cause or relationship to spontaneous abortion?

A. [BY DR. KIDERA]: No.

* * *

Q. [BY MR. FLYNN]: Now, doctor, your opinion, even as of now, is not based on any empirical data with respect to interviews of persons who have been in emergency situations, is it?

A. [DR. WOLFF, United witness]: Of the kind you are talking about; no, sir.

Q. [BY MR. FLYNN]: What attempts did you make, doctor [Wolff], to determine whether there was available a source to develop empirical studies in this area [emotional changes in pregnancy affecting performance of emergency evacuations]?

THE COURT: Unless you can show me there are such studies, I'm going to cut you off only for the reason because I have heard your doctor, now this doctor, and I'm sure the other one is going to say they know of no such study.

Now, if they don't know of any, how can they use them?

[BY MR. FLYNN]: I'm asking the doctor, Your Honor, if given a data base, he would not think it appropriate to make an empirical study in order to corroborate his opinion.

THE COURT: Objection sustained. You can argue that with me. He doesn't have any and he didn't do it.

* * *

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e-2 (a) and (e)(1) (1970 and Supp. V. 1975), provide:

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

"(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * * ."

Section 1604.2(a)(1) of the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1976), provides:

"§ 1604.2 Sex as a bona fide occupational qualification.

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label [sic] -- 'Men's jobs' and 'Women's jobs' -- tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of

women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this paragraph."

* * *

Supreme Court, U. S.
FILED
MAR 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1060

KAREN CONDIT AND MARY E. ORAVEC,
Petitioners,

vs.

UNITED AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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March 2, 1978.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

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KAREN CONDIT AND MARY E. ORAVEC,

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UNITED AIR LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The memorandum opinion and order of the United States District Court is not officially reported, but is unofficially reported at 13 F. E. P. cases 689 (E. D. Va. 1976). The *per curiam* opinion of the Court of Appeals is reported at 558 F. 2d 1176 (4th Cir. 1977). Petitioners' petition to the Fourth Circuit for rehearing with suggestion for rehearing *en banc* was denied August 31, 1977.

JURISDICTION.

The jurisdiction of this Court was timely invoked by Petitioners under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The questions presented by the Petitioners are as follows:

"1. Whether an airline can justify its policy requiring every female flight attendant to take an unpaid maternity leave from the time that she learns of her pregnancy until a post-pregnancy medical examination satisfies the airline that she may return to duty, as a *bona fide* occupational qualification ("bfoq") under Section 703(e) of Title VII of the Civil Rights Act of 1964, as amended, or as a business necessity, by showing only that the challenged policy is "consistent with", rather than essential to, a legitimate business objective of the airline.

"2. Whether an employer can succeed on a bfoq or business necessity defense on the ground that safety requires the policy at issue when (a) the agency charged with regulating safety has determined that the policy is not necessary to ensure safety and (b) the employer itself has no empirical evidence or studies to justify the policy in terms of safety."

STATUTES.

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a) and (e)(1).

STATEMENT OF THE CASE.

United Air Lines, Inc. ("United" or the "Company"), an interstate common carrier by air, has long had a policy, in common with virtually all other air carriers, of requiring stewardesses to discontinue flying upon knowledge of pregnancy for reasons of safety. The rule applies only to stewardesses and does not apply to any other female employees of the Company. The policy, as it appears in the collective bargaining agreement between United and its stewardesses, reads as follows:

"A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant

such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence, however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy."

Petitioner Karen Condit is a former stewardess of United who became pregnant during her employment in 1972. In accordance with the policy quoted above, she was required to take a maternity leave when her pregnancy became known. After the birth of her child she voluntarily resigned in 1973 for reasons unrelated to this case.

Petitioner Mary E. Oravec is and has been employed by United as a stewardess. During the course of her employment in 1972, she also became pregnant and was required to take a maternity leave during the period of her pregnancy. After her pregnancy ended, she returned to flight status and continues in that status to date.

Each of the two Petitioner stewardesses subsequently filed charges with the Equal Employment Opportunity Commission ("EEOC") alleging, *inter alia,* that United violated Title VII of the Civil Rights Act of 1964 ("Act") by requiring them to take maternity leaves upon knowledge of pregnancy. Petitioner Condit, after receipt of a right-to-sue letter from the EEOC, filed a class action suit in the U. S. District Court for the Eastern District of Virginia on May 6, 1974 based upon her charge. Petitioner Oravec intervened as a named plaintiff in the suit in September, 1974. On January 22, 1975, the District Court certified the action as a class action with respect to all female flight attendants now employed by United or so employed at any time beginning on March 19, 1972.

Trial on the issue of whether United's maternity leave policy was justified as a *bona fide* occupational qualification under Section 703(e) of Title VII took place before the District Court on October 28, 1975. Trial was resumed on November 26, 1975 for the introduction of the testimony of United's chief medical officer, who had been unavailable on October 28.

During the course of the trial, the District Court heard the testimony of three medical experts and the testimony of United's chief in-flight safety officer. Additionally, the court had before it the deposition testimony of another medical expert, a stipulation of facts and numerous exhibits. Post hearing briefs were filed by both parties.

On September 3, 1976, the District Court issued its Memorandum Opinion and Order in which it reviewed the evidence and arguments placed before it by the parties and concluded, based upon this evidence and these arguments, that (Appendix to Petition, p. 21a):

> "United has clearly shown by the record here made that its mandatory maternity leave policy has a manifest relationship to the continuing employment of stewardesses during their pregnancy.
>
> The safety of the passengers must come first—in case of doubt, that doubt must be resolved in favor of the passengers—Airlines must take no chances when it comes to safety.
>
> Taking into account the total pregnancy picture as here shown, United is justified in enforcing its mandatory maternity leave policy as a bona fide occupational qualification for the continued employment of stewardesses during their pregnancy."

Petitioners appealed the District Court's decision to the U. S. Court of Appeals for the Fourth Circuit where briefs were filed and oral arguments were presented. On July 28, 1977, the Fourth Circuit, in a *per curiam* decision, affirmed the decision of the District Court. The Fourth Circuit's decision reads in full as follows (558 F. 2d 1176):

"PER CURIAM:

Karen Condit, a stewardess representing a class composed of herself and all others similarly situated, and Mary E. Oravec, an intervenor, appeal from an order of the district court holding that the maternity leave policy of United Air Lines, Inc., constitutes a bona fide occupational qualification under § 703(e) of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e-2(e)). We affirm.

United requires that all stewardesses discontinue flying as soon as they become aware that they are pregnant. The stewardesses contend that each stewardess should be allowed to continue working as long as she can safely perform her duties.

The district court found, on conflicting expert testimony, that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It therefore concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers. [Footnote omitted.]

The district court's ruling that United's policy is a bona fide occupational qualification is based on findings of fact which, on the evidence presented by this record, are not clearly erroneous. Fed. R. Civ. P. 52(a). Accordingly, the judgment is affirmed."

Petitioners petitioned the Fourth Circuit for a rehearing with a suggestion for rehearing *en banc*. This petition was denied. Thereafter, on January 27, 1978, Petitioners requested this Court to grant certiorari.

REASONS FOR DENYING THE PETITION.

The issue of whether a practice or policy of an employer constitutes a "*bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" within the meaning of Section 703(e) of Title VII

is an issue of *fact* to be decided by the trial court. In the instant case, after a full and complete trial, and for the reasons set forth at length in the trial court's decision, the court found that United's policy of requiring stewardesses to take a maternity leave upon knowledge of pregnancy was justified as a *bona fide* occupational qualification under Section 703(e). Inasmuch as the trial court's decision was based upon the evidence presented to it and involved an issue of fact and not an issue of law, its decision properly lies within its area of competency.

Rule 52(a) of the Federal Rules of Civil Procedures provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses."

Based on Rule 52(a), the Fourth Circuit found that the trial court's decision was not "clearly erroneous" and properly refused to set aside the judgment of the trial court.

It is not the policy of this Court to sit in the position of the trial court. As this Court concisely stated in *New Haven Inclusion Cases*, 399 U. S. 392, 435 (1970):

> ". . . It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

Inasmuch as there has been a full trial on the factual question of whether United's practice of requiring stewardesses to discontinue flying when pregnant constitutes a *bona fide* occupational qualification within the meaning of Section 703(e) of the Act, and there has been a factual finding based on the evidence, there is no proper basis for review by this Court.

In their construction of the two questions at issue, Petitioners endeavor to persuade this Court that certiorari should be granted

because the lower courts allegedly used the wrong standard for determining whether a *bona fide* occupational qualification exists. Thus, in question one, Petitioners imply that the decision of the trial court below was based simply on a showing by United that the challenged policy is only "consistent with", rather than essential to, a legitimate business objective of the carrier.

The fact is the District Court's decision did not rest on the standard asserted by the Petitioners. As reference to the comprehensive decision of the District Court itself shows, the decision of that Court rested on the showing made by United that it is obligated by Section 601(b) of the Federal Aviation Act, 49 U. S. C. 1421(b), to perform its services with the "highest possible degree of safety in the public interest" and that the primary business objective of United is to transport passengers safely from one point to another. After hearing medical and operational evidence concerning the role of stewardesses in meeting this objective, the District Court correctly ruled that United's policy met the requirements of Section 703(e) of the Act in that the practice was reasonably necessary to the operation of the business.

In affirming the decision of the District Court, the Fourth Circuit characterized the District Court's decision as one which:

> ". . . concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers." (558 F. 2d at 1176.)

This characterization of the District Court's decision does not, of course, change the actual standard used by the District Court in arriving at its decision, which is set forth in that decision itself, but is merely an abbreviated description of the general nature of the decision. Since an examination of the District Court's decision will establish it was based on the correct standard, the Petitioners' endeavor to persuade this Court to the contrary must fail.

Petitioners, in their phrasing of the second question presented for review, urge this Court to consider whether an employer can succeed in establishing a *bona fide* occupational qualification "when the agency charged with regulating safety has determined that the policy is not necessary to ensure safety" and the employer itself has no empirical evidence or studies to justify the policy in terms of safety.

The short answer to Petitioners' second question is that the Federal Aviation Act imposes the duty of exercising the highest degree of safety in the transportation of passengers directly on the air carrier, not on a federal agency. In the case at hand, the federal agency here involved (Federal Aviation Administration) has promulgated no health or physical standards at all for stewardesses since those standards are imposed by the carriers on whom the duty of safety rests. With respect to the absence of "empirical evidence or studies" to justify the policy, the short answer to this assertion is that United cannot risk the safety of its passengers by experimenting with continued employment of pregnant stewardesses any more than it can risk the safety of passengers by permitting pilots to continue flying when there is a risk of incapacitation.

Finally, this Court's Rule 19 sets forth the general considerations governing the granting of petitions for writs of certiorari and none of the considerations are present in this case. No state court decision is involved interpreting a federal question of substance; there is no conflict between the U. S. Circuit Courts of Appeal; no state or territorial question is involved; no important question of federal law which should be settled by this Court is involved; no federal question which is in conflict with applicable decisions of this Court is involved and there has been no departure from the accepted and usual course of judicial proceedings, or sanctioning of such proceedings, as to call for an exercise of this Court's power of supervision.

As stated many years ago by this Court in the decision in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393 (1923):

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case comes under neither head."

So, too, the decision here involved is not one which is of importance to the public, nor is there any conflict in the Circuits. The effect of the petition in this case is simply to have this Court substitute its judgment for that of the trial court as to factual matters properly within the trial court's domain.

Wherefore, United respectfully requests this Court to deny the petition.

Respectfully submitted,

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March 2, 1978.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1060

KAREN CONDIT and MARY E. ORAVEC,
Petitioners,

v.

UNITED AIR LINES, INC.
Respondent.

On Petition For A Writ of Certiori
To The United States Court of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners have sought review of a judgment below that, because United's policy is "consistent" with its duty to assure safe air transportation, United may require all female flight attendants ("stewardesses") to take unpaid leaves of absence throughout the duration of pregnancy, even though (a) United offered no empirical evidence as to a factual basis for believing that most or even many such stewardesses cannot perform their duties as well as non-pregnant stewardesses during at least the first six months of pregnancy, (b) the trial court found that the Federal Aviation Administration takes the position that

the issue should be dealt with on an individual basis rather than by a general policy such as United's, and (c) the trial court found that one major U.S. carrier, Northwest, permits pregnant stewardesses to continue working on an individualized basis even beyond the sixth month of pregnancy. United has filed a Brief in Opposition to the Petition, urging (a) without citation of authority, that the statutory affirmative defense of "bona fide occupational qualification" is entirely a matter of fact and "not an issue of law," (b) that, while "virtually all other carriers" have the same forced leave policy as United, the decision below is of no public importance, and (c) that the case presents no federal question that is either important or in conflict with applicable decisions of this Court. Petitioners now submit this Reply to United's Opposition.

The Petition addresses in detail the public importance of this case and the decisions with which the judgment below is in conflict, but United ignores both the arguments and the cases. As to the importance, we note first that, after almost fourteen years of Title VII sex discrimination litigation in the lower courts, this Court has addressed the nature and scope of the "bfoq" defense on only one occasion, in Dothard v. Rawlinson, 45 U.S.L.W. 4888 (1977). 1/ There the Court stressed the

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1/ The Court did briefly discuss the business necessity defense in the context of maternity leaves in Nashville Gas Company v. Satty, 46 U.S.L.W. 4026, 4028, n. 5 [continued on following page]

"extremely narrow scope" of the defense and gave weight to the EEOC's guidelines mandating that narrow interpretation, see 45 U.S.L.W. at 4891, but it upheld the defense in a fact situation that it recognized to be virtually sui generis. As we stated in the Petition, we believe the decision below to conflict with the Court's analysis in Dothard, and the conflict is even more pointed with numerous Circuit decisions cited with favor in Dothard. See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan American

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1/ [continued from preceding page] (12/6/77), though the employer in Satty had not relied upon the defense. The Court noted that the policy of denying accumulated seniority might conflict with the employer's business interests by favoring inexperienced employees and by interfering with the motivation of female employees "because of the greater difficulty in advancing through the firm." Despite United's position here as to the great importance of the stewardess as a safety officer, United previously took the following position in explaining why the fact of marriage made stewardesses no longer useful employees:

"These same changes [resulting from marriage], the experts concluded, are not likely to occur with respect to male members of the flight crew whose jobs, unlike those of the stewardesses, contemplate lifetime careers with steady progression to higher levels of skill, and who over the years have exhibited

World Airways, 442 F.2d 385 (7th Cir. 1971); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969). Moreover, the decision is inconsistent with the Eighth Circuit's recent application of the bfoq defense, under the Age Discrimination Act, in Houghton v. McDonnell Douglas Corp., 553 F.2d 561, cert. denied, 46 U.S.L.W. 3357 (1977), and with the Seventh Circuit's rejection of the bfoq defense in the predecessor to this case, invalidating United's policy of prohibiting continued employment of all married stewardesses. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (1971).

Finally, the decision below is inconsistent with this Court's treatment of forced maternity leave rules for pregnant teachers in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). While LaFleur arose under the Fourteenth Amendment, the Court there was called upon to measure the justifications advanced by the school boards against the constitutional rights of employees not to be penalized by "overly restrictive maternity leave regulations . . . ."

1/ [continued from previous page] no comparable deterioration in work performance as a result of marriage." (Joint Appendix at 117)

Petitioners have lodged with the Clerk's Office of the Court a copy of the Joint Appendix as filed in the court below.

414 U.S. at 640. In invalidating the arbitrary four and five month cutoff dates because of their overbreadth and lack of "individualized determination" as to the capacities of individual teachers, the Court nonetheless recognized that the school boards' objectives were "perfectly legitimate, both on educational and safety grounds." 414 U.S. at 643-4. The constitutional standard, which the court found not to be met in LaFleur, was that of a rational relationship to an admittedly valid state interest. 414 U.S. at 632. Since this Court has recognized that the standard of justification under Title VII is more rigorous than under the Fourteenth Amendment, see Washington v. Davis, 426 U.S. 229, 246-7 (1976), we believe that the decision below upholding United's automatic forced leave rule merely on the basis of consistency with a valid objective is in conflict with LaFleur.

Even apart from the important general issue of the standard to be met by an employer, either under the bfoq or the "business necessity" defense in Title VII sex discrimination cases, review by this Court of the decision below is important in order to provide guidance to the federal courts in the numerous actions now pending in various stages throughout the country witn respect to the precise issue involved here -- the validity of the forced leave policy to which all major U.S. carriers other than Northwest have informally agreed. 2/ We discussed some of those cases in the Petition, but

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2/ United's statement that its policy is "in common with virtually all other [continued on following page]

United's opposition has ignored them in asserting that this case is of importance only to the litigants here. To date, four district courts have ruled on the validity of the forced leave rule for stewardesses subsequent to the district court's decision here. In MacLennan v. American Air Lines, Inc., 15 F.E.P. Cases 1684 (E.D. Va. 1977) (Bryan, J.), the court specifically rejected the rationale of Judge Lewis in this case, finding that "[t]he defendant must prove that the policy is reasonably necessary, not merely that it is 'reasonable,'" and it thus prohibited automatic termination of flight duty prior to the 26th

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2/ [continued from preceding page] air carriers" applies only to U.S. based air carriers that are members of the Air Transport Association and the Air Conference. Judge Lewis' opinion (App. B to Petition at 10a) addressed the efforts of those two industry organizations relating to the common policy, but the ability of the two organizations to prevent all members other than Northwest and two small carriers from changing the common policy despite the inability to produce evidence in support of it is best shown by correspondence between Air Conference and its members (see Plaintiff's Exhibits 5 and 7, Joint Appendix at 95-108) In PX 7, TWA assured Air Conference that, despite the attached study by its Chief Medical Officer concluding that pregnant stewardesses should be prohibited from flying only during the last three months of pregnancy, TWA would not adopt that change in policy in the absence of an "industry position" for such a change.

week of pregnancy. 15 F.E.P. Cases at 1689. (Emphasis in original.) In Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977), the court cited the opinions below with approval and reached the same result as in this case. In re National Airlines, Inc., 14 F.E.P. Cases 1806 (S.D. Fla. 1977), the court held that National had failed to justify the automatic forced leave policy as it applied to stewardesses prior to the 21st week of pregnancy. And, most recently, in EEOC v. Delta Air Lines, Inc., C.A. No. 74-H-918 (Consolidated) (S.D. Tex. 11/8/77 - unpublished), the court held that the opinions below and the Harriss case foreclosed the plaintiffs' claim on the forced leave issue, entitling Delta to summary judgment. 3/

The confusion evidenced by the four decisions as to the scope of the bfoq defense and as to the meaning of the opinions in this case is quite likely to continue not only in the appellate proceedings in those four cases but also in pending and undecided district court cases involving the same issue. Those cases include, but may not be limited to, Burwell v. Eastern Airlines, Inc., C.A. No. 74-0418 (E.D. Va., Richmond Division); ALPA et al. v. Western Airlines, Inc., C.A. No. C-74-1418 (N.D. Cal.); James v. Delta Airlines, Inc., C.A. No. 74-1676 A, (N.D. Ga.); Gardner et al., v. National Airlines,

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3/ The court in the Delta case did not refer to the decisions in the American and National cases, supra. Had it chosen to rely upon those cases, it could well have decided that plaintiffs, rather than Delta, were entitled to summary judgment.

Inc., C.A. No. 75-329-A (E.D. Va., Alexandria Division); and Willet v. Delta Airlines, Inc., C.A. NO. 75-C-1517 (N.D. Ill.).

In view of the numerous pending cases in the federal courts involving the same issues presented here, review by this Court would be warranted to establish the controlling principle of law even in the absence of the conflicts that we discussed above. See, e.g., United States v. Powell, 330 U.S. 238, 240 (1947).

United's final statement in its Opposition that petitioners seek only to have this Court "substitute its judgment for that of the trial court as to factual matters properly within the trial court's domain" is entirely without basis in the Petition. Neither in the Petition nor in the court below did petitioners urge that the principal error of the trial court lay in its treatment of the record. Rather, our consistent position has been that both the findings made by the trial court and the absence of other findings to support the trial court's decision precluded a judgment that United established either a bfoq or business necessity defense, unless both the bfoq guidelines issued by the EEOC (Appendix F to Petition at 34a-35a) and the scope of the defenses as found in Dothard and the other decisions discussed above are ignored. That is precisely what was done by the court below in its determination that United needed only to show that its forced leave rule was "consistent" with a valid objective. If that is the standard to be applied in any case where the employer invokes safety as a rationale, then safety will surely be asserted as the rationale by most employers in Title VII sex discrimination cases. No one would

deny, for example, that schoolteachers must be capable of promptly evacuating their students in fires and other emergencies, but the possibilities are much wider than that. In Weeks, for example, the employer sought to support its refusal to hire women as telephone switchmen in part because it feared the capacity of women to perform adequately in emergencies. 408 F.2d at 236. In reversing the district court's finding that a bfoq defense was established, the Fifth Circuit in Weeks gave short shrift to that argument. 4/ Had the Fifth Circuit followed the "consistent" with a valid objective standard applied by the court below, requiring no evidence of a factual basis to support the argument, the employer's safety justification should have carried the day in Weeks. In any event, under United's analysis, the appellate decisions in Weeks, Bowe, and Diaz, supra, were all incorrect, since each reversed a trial court's determination that the employer had established a bfoq defense and none rejected or even criticized any of the findings of fact made by the trial court. Rather, in each case, the court of appeals held that the findings were insufficient to establish the defense because the trial court had misconceived the very narrow and

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4/ "The emergency work which a switchman allegedly must perform consists primarily in the handling of a 34-pound extinguisher in the event of a fire. A speculative emergency like that could be used as a smokescreen by any employer bent on discriminating against women." 408 F.2d at 236.

limited scope of the bfoq defense. The court below, however, failed to apply that narrow legal standard, and that error, as the questions raised in the Petition show, is the basis for the Petition.

The short of it is that United's arguments in its Opposition meet none of the arguments in the Petition. The best that could be said of the decision below, from United's perspective, is that it is sufficiently limited in its treatment of this important and widely litigated issue that its impact upon other cases might be slight. The fallacy of that argument lies in the fact that at least some other courts are not so reading the decision. Indeed, as we have noted, the trial court in the Delta case has read it as precluding the plaintiffs even from having a trial to test the validity of Delta's position. See p. 7, supra.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the judgment of the Fourth Circuit.

Respectfully submitted,

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